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BEFORE THE

**Federal Communications Commission**

WASHINGTON, D.C. 20554

In re Applications of

MM DOCKET NO. 93-42

MOONBEAM, INC.

File No. BPH-911115MG

GARY E. WILLSON

File No. BPH-911115MO

For a Construction Permit  
New FM Station on Channel 265A  
in Calistoga, California

TO: The Honorable Edward Luton  
Administrative Law Judge

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**OPPOSITION TO PETITION FOR LEAVE TO AMEND**

Gary E. Willson (Willson) files this opposition to the Petition for Leave to Amend filed by Moonbeam, Inc. (Moonbeam) on February 9, 1994. Moonbeam seeks to amend its application to report certain broadcast interests of Mary Constant's husband, Frederick W. Constant. It further seeks to avoid any diversification demerit by untimely asserting on behalf of Fred Constant that these interests will be divested. At best, Moonbeam's application should be accepted for informational purposes only, and its attempt to improve its comparative posture should be rejected.

Moonbeam has failed to demonstrate good cause for acceptance of its late-filed amendment. Contrary to Moonbeam's assertions otherwise, Moonbeam fails to meet the Erwin O'Connor Broadcasting Company, 22 FCC2d 140 (Rev. Bd. 1970) good cause test. The test requires that: (1) the applicant acted with due diligence; (2) the proposed amendment is not required by its voluntary act; (3) no modification or addition of issues or parties will be

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necessary as a result of the amendment; (4) the amendment will not disrupt the orderly conduct of the hearing or require additional hearing; (5) other parties will not be unfairly prejudiced; and (6) the applicant will not gain a comparative advantage.

Moonbeam has clearly not acted with due diligence. Fred Constant has been the general manager of KRSB in Middleton, California since the end of November 1993. See Willson's Petition to Reopen the Record and Enlarge Issues Against Moonbeam, Inc. Yet this management position was not reported until February 9, 1994. Likewise, the assignment application for the construction permit of a new FM station in Sutter Creek, California was filed on December 9, 1993 but not reported until February 9, 1994. Finally, Idaho Broadcast Consortium, Inc.'s application (100 percent owned by Fred Constant) for a new FM station in Gooding, Idaho was filed on September 20, 1993, but not reported until nearly five months later. None of these interests was timely reported despite the fact Moonbeam was on notice of the need to timely report such interests. Moonbeam failed to report Fred Constant's 100 percent ownership interest of a construction permit for a station in Ketchum, Idaho earlier in this proceeding. It was reported then only after Willson raised the issue. In its July 21, 1993 Petition for Leave to Amend reporting the Ketchum, Idaho interest, Moonbeam claimed that its failure to report was "an unintentional administrative oversight." Despite this past history and a pending Petition to Reopen the Record, Moonbeam failed to report any of these

subsequent Fred Constant interests until nearly one month after Willson filed his Petition to Reopen the Record and Enlarge Issues. It would be untrue, at the very least, to say that Moonbeam has acted with due diligence.<sup>1</sup>

Moonbeam also asserts that it will not gain any comparative advantage as a result of the amendment. Moonbeam's amendment states that, "if it is determined that any one or more of the foregoing interests shall result in a diversification demerit against Moonbeam, the interest will be divested." This late-filed contingent divestiture commitment must be rejected. In order to avoid any diversification demerit, Mr. Constant and Moonbeam had an obligation to make a divestiture commitment contemporaneously or at most within 30 days of commencement of Mr. Constant's employment as a general manager and, again, contemporaneously or at most within 30 days of filing the application for the new Gooding, Idaho station. This Moonbeam has not done. See Santee Cooper Broadcasting Company, 99 FCC 2d 781, 794-795 (Rev. Bd. 1984); Jerome Thomas Lamprecht, 99 FCC2d 1219, 1222, (Rev. Bd. 1984)(diversification demerit assessed for failure to make divestiture commitment within 30 days or within the time the interest must be reported pursuant to Rule 1.65); see also Big Bay Broadcasting, 3 FCC Rcd. 6481, 6487 (ALJ 1988) aff'd Rev. Bd., 4 FCC Rcd. 4676 (Rev. Bd. 1989) aff'd Comm. 5 FCC Rcd. 1294

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<sup>1</sup> Willson also notes that Moonbeam's amendment, or more accurately its failure to timely amend, has resulted in the disruption or the orderly conduct of the proceeding and may require addition of issues.

(1990)(divestiture pledge must be made within 30 days of purchase of local weekly newspaper); see also Colonial Communications, Inc., 67 RR2d 999 at n. 5 (Rev. Bd. 1990).

WHEREFORE, Moonbeam's petition for leave to amend should be denied or, if accepted, accepted solely for informational purposes without any benefit to Moonbeam's comparative posture.

Respectfully submitted,

GARY E. WILLSON

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By   
A. Wray Hitch III  
His Attorney

February 22, 1994

[0068/C94awfOppAmend]

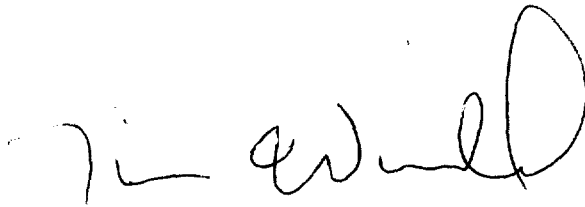
CERTIFICATE OF SERVICE

I, Tim Wineland, in the law offices of Gammon & Grange, P.C., hereby certify that I have sent, this 22nd day of February 1994, by first-class, postage-prepaid, U.S. Mail, copies of the foregoing OPPOSITION TO PETITION FOR LEAVE TO AMEND to the following:

\* The Honorable Edward Luton  
Administrative Law Judge  
Federal Communications Commission  
2000 L Street, N.W., Room 225  
Washington, D.C. 20554

Hearing Branch, Mass Media Bureau  
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(Counsel for Moonbeam, Inc.)

A handwritten signature in black ink, appearing to read "Tim Wineland", written over a horizontal line.

Tim Wineland

\* By Hand